In The

Supreme Court of the United States

October Term, 1976

No. 76-542

JIMMIE DALE THOMASON,

Petitioner,

vs.

JOHN H. SANCHEZ, GOVERNMENT EMPLOYEES INSURANCE CO. and THE UNITED STATES OF AMERICA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROY D. CUMMINS
Attorney for Respondents
John H. Sanchez and Government
Employees Insurance Co.
314 Cooper Parkway Building
Pennsauken, New Jersey 08109
(609) 662-8350

(9266)
LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850
New York, N.Y. (212) 563-2121
Philadelphia, Pa. (215) 563-5587
Washington, D.C. (201) 783-7288

TABLE OF CONTENTS

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Statutes Cited:

In The

Supreme Court of the United States

October Term, 1976

No.

JIMMIE DALE THOMASON,

Petitioner,

vs.

JOHN H. SANCHEZ, GOVERNMENT EMPLOYEES INSURANCE CO. and THE UNITED STATES OF AMERICA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Should prior decisions of the United States Supreme Court and the Courts of Appeals, which preclude a tort remedy by one serviceman against another for injuries occurring incident to service and limiting said serviceman's remedy to a comprehensive system of benefits which are federally administered, be reviewed?

STATEMENT OF THE CASE

This action for personal injuries arises as a result of an automobile accident which occurred on the premises of the Fort Dix Military Reservation, New Jersey, on November 30, 1972. The petitioner, Jimmie Dale Thomason, was stationed at Fort Dix holding the rank of Specialist Fourth Class and was being carried by the Army on an active duty status even though the accident occurred in the evening which was during his off-duty hours.

The respondent, John H. Sanchez, also stationed at Fort Dix, was functioning within the scope of his duty assignment at the time of the accident. The respondent, Government Employees Insurance Company, insured the private passenger automobile of Sanchez which automobile was involved in the collision.

Initially, the petitioner filed suit in the Superior Court of the State of New Jersey, Law Division, naming Sanchez as a defendant. GEICO entered a defense on behalf of Sanchez and

raised the defense *inter alia* that such suit against Sanchez personally was barred by the Federal Drivers Act, 28 U.S.C. §2679(b)-(e).

Subsequently and pursuant to a verified petition of the Attorney General that Sanchez was acting in the scope of his employment, that case was removed to the United States District Court for the District of New Jersey pursuant to 28 U.S.C.A. §2679(d)[1]. Subsequently, in order to satisfy certain procedural requirements, the petitioner filed several suits sounding in tort as well as a declaratory judgment action, all of which were consolidated by order of the district court. The purpose of those suits was to determine the rights and liabilities of the petitioner against United States of America and Sanchez and against GEICO to such an extent as GEICO insured the personal interest of Sanchez. The district court determined that all tort claims against Sanchez were barred by the Federal Drivers Act and subsequent construing decisions and that all such claims against the United States of America were likewise barred by the Federal Tort Claims Act and the line of decisions which have come to be known as the *Feres* Doctrine.[2] Appeal was taken to the United States Court of Appeals for the Third Circuit which affirmed.

1. 28 U.S.C.A. Section 2679(d) states in pertinent part that "upon certification that the defendant was acting within the scope of his employment . . . any civil action or proceeding commenced in a state court shall be removed . . . to the district court of the United States . . . and the proceeding deemed a tort action brought against the United States under the provisions of this title and all references thereto."

From the language it is clear that the Attorney General owes a defense to the defendant Sanchez and, in fact, such defense was entered for him in the district court. The appearance of counsel appointed by the petitioner's insurance carrier is for the purpose of presenting a position as to the personal liability of Sanchez and for the purpose of defending the carrier which is a party in these consolidated actions.

2. *Feres v. United States*, 340 U.S. 135, 95 L. Ed. 152, 72 S. Ct. 153 (1950).

ARGUMENT

I.

Issues I through V of the petition question whether recovery may be had against the United States of America under the terms of the Federal Tort Claims Act and cases construing same. Counsel appointed by the liability insurer of the respondent Sanchez represents the personal interests of Sanchez and his insurer only and, therefore, takes no position with regard to issues affecting the interests of the United States of America.

II.

The "due process" issue in Point VI of the petition, which issue was raised and disposed of below, does not set forth grounds for disagreement with the lower court determination save for bare contentions and, therefore, writ of certiorari should not be granted as to that issue.

Before the Third Circuit, the petitioner raised the argument that the Federal Drivers Act as applied to him worked as a deprivation of all remedies constituting a denial of due process. Judge Aldisert noted that the case of *Carr v. United States,* 422 F.2d 1007 (4th Cir. 1970) dealt precisely with that issue and disposed of it in favor of constitutionality ((PA25a-27a).

The petition takes issue with *Carr* only on the basis that it dealt with civilian employees of the federal government and soldiers. Further issue is taken with *Van Houten v. Ralls,* 411 F.2d 943 (9th Cir. 1969), *reh. den.,* (1969) and *Noga v. United States,* 411 F.2d 940 (9th Cir. 1969), on the basis that "a careful

reading and comparison (of the three cases) shows that the 'due process' argument, in circumstances as are here applicable, has *never* previously received a federal court's attention." (P17). We are not made privy to the petitioner's reasoning as to why *Carr* should be distinguished on the basis of the civilian versus military comparison. Likewise, the heretofore untreated circumstances set forth by the petitioner as reason to disregard *Van Houten* and *Noga* are not characterized. The respondent will not attempt to anticipate them here.

Suffice it to say that the Third Circuit correctly read the message of Congress when it stated:

> "The reason for this rule lies in the exclusivity provision of 28 U.S.C. §2679(b), the basic purpose of which was to immunize individual government drivers from the heavy financial burdens and personal liabilities associated with operating motor vehicles. A contrary interpretation of the 'not available' language in the removal section 'would revitalize the common law action. [T]his result would directly contradict the Act's immunizing purpose. . . .' *Ibid.* Moreover, Congress itself has indicated approval of this judicial construction of the exclusivity provision of the Federal Drivers' Act. Accordingly, we confidently join ranks with the Fourth, Sixth and Ninth Circuits." (PA22a-23a).

CONCLUSION

It is the position of this respondent that a writ of certiorari should not be granted. Due to the multitude of judicial opinions on the subject of the construction of the statutes here in question, it is respectfully submitted that an additional one is unnecessary. However, should the Court find merit in the petitioner's request, it is submitted that the petition does not raise such a meritorious complaint with the construction given to the Federal Drivers Act by the lower court so as to warrant hearing on that issue by the Supreme Court of the United States. Accordingly, should the writ be granted, it should be in a limited form and should not be for the purpose of considering any remedies against the respondent Sanchez personally or his liability insurance carrier, Government Employees Insurance Company which are inconsistent with the opinion of the Third Circuit Court of Appeals.

Respectfully submitted,

s/ Roy D. Cummins
Attorney for Petitioner